IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1035

JULIA ROGERS,

Petitioner,

v.

LEROY LOETHER and MARIANNE LOETHER, his wife, and MRS. ANTHONY PEREZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Seventh Amendment entitles a party to a jury trial in a civil action in a United States District Court for compensatory and punitive damages under Section 812 of the Civil Rights Act of 1968.

STATEMENT OF THE CASE

On November 7, 1969, the plaintiff, Julia Rogers, by her counsel, Milwaukee Legal Services, commenced a civil action in the United States District Court for the Eastern District of Wisconsin under the private enforcement provisions of the Civil Rights Act of 1968. The complaint was based on events which had occurred within the week immediately preceding the date of filing. Prior to the initiation of the civil action there had been no application to the Secretary of Housing and Urban Development for assistance in obtaining voluntary compliance with the Act under the provisions of sections 810-811.

The plaintiff initially sought punitive damages and injunctive relief and then, when the issues were being formulated for trial, interjected a claim for her actual damages. (18a). There was no request for a permanent injunction in the complaint and none was ever sought in the course of the proceedings. Judge Reynolds granted a preliminary injunction enjoining the defendants from renting the apartment in question after conducting a hearing on November 20, 1969. Neither the plaintiff nor Judge Reynolds ever pressed for the rental of the apartment to Mrs. Rogers after the injunction was entered.

The defendants' request for jury trial was contained in their answer. During the pre-trial conference held on January 5, 1970, District Judge Reynolds, *sua sponte,* challenged the defendants' right to a jury and his pre-trial order directed them to submit authorities in support of their right to a jury unless they withdrew their jury demand. (18a-19a).

Following the submission of authorities by both the plaintiff and defendants, arguments were heard on the

issue on April 30, 1970. On this occasion the plaintiff's counsel confirmed that the plaintiff had obtained other housing and consented to the dissolution of the preliminary injunction. (Hearing of April 30, 1970, p. 3). Defendants' counsel reiterated their offer, which had been made at the January 5, 1970 pre-trial conference, to rent the apartment in question to any Negro family. (Hearing of April 30, 1970, p. 3). Judge Reynolds had strongly urged plaintiff's counsel to recommend acceptance of the defendants' proposal to the plaintiff and on April 30, 1970 he stated that the defendants' offer satisfied the purpose of the statute which was to open up housing to Negroes. He further observed that punitive damages would be inappropriate in the case because of the defendants' offer and that the only issue remaining for trial was the amount of the actual damages. (Hearing of April 30, 1970, p. 4).

The case was tried before Judge Reynolds on October 26 and 27, 1970. The entire testimony given on direct examination at the time of the trial on behalf of the plaintiff related to her claim for actual-compensatory damages.

At the close of the trial the court announced its conclusion that the apartment was not rented to the plaintiff because of her race and also found that no compensatory damages had been proven. (Trial of October 26-27, 1970, p. 210). However, the court did award $250 in punitive damages and denied the plaintiff's request for an award of attorneys' fees and costs. The judgment embodying the court's decision on the issues was entered December 7, 1970.

The Seventh Circuit reversed, holding that defendants' jury trial demand should have been granted because the

action was in the nature of a suit at common law and, hence, within the purview of the Seventh Amendment.

SUMMARY OF ARGUMENT

I. A. Congress did not specify how issues of fact were to be tried in private actions under section 812 of the 1968 Act. It did choose to denominate the proceeding as a "civil action" and the use of this term of art strongly indicates that the action is to be more in the nature of an ordinary lawsuit than some hybrid proceeding in which a jury trial would be out of place.

B. The nature and purpose of the Civil Rights Act of 1968 give rise to conflicting policy considerations on the use of juries to decide the factual issues in an action based on alleged racial discrimination. Although the plaintiff fears the prejudices of a jury drawn from the community, the Seventh Circuit in the instant case recognized that ". . . the desirability of broadening lay participation in judicial implementation of civil rights" constituted a valid policy consideration favoring use of juries in these cases. *Rogers v. Loether,* 467 F. 2d 1110, 1123.

The recent sweeping revisions of the federal law of jury selection and service should neutralize, at least for the present, the expressions of concern in Congress relating to jury biases. Congress acted on this concern in an elaborate fashion with the Jury Selection and Service Act of 1968 and the further amendment in 1972 and its actions should not be presumed inadequate. Rather the Court should recognize that the new legislation to insure that federal juries are drawn from a fair cross-section of the community, with racial discrimination forbidden, eliminates the fear of jury bias as a policy con-

sideration and leaves the Seventh Amendment question to be squarely faced.

II. A. The Seventh Amendment to the Constitution provides that in "suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The decisions of this court demonstrate that the Seventh Amendment right applies to all actions which are analogous to those which were tried to a jury under the English common law in 1791 when the amendment was adopted. *E.g., Parsons v. Bedford,* 28 U.S. (3 Pet.) 433 (1830). The preservative power of the Seventh Amendment reaches all suits in which legal rights are to be decided, not merely those suits which were among the common law's "old and settled proceedings." 28 U.S. 447.

When Congress enacts a new statutory cause of action and nothing is said about how issues of fact are to be decided, the right to jury trial is resolved by reference to the new action's closest historical analogy. *Ross v. Bernard,* 396 U.S. 531, 543, n. 1. In the course of seeking the appropriate analogue the common law is not to be viewed restrictively so as to deny the right to jury trial in actions which did not exist under the same nomenclature in 1791 or which would have been out of keeping with the common law of that time. Rather jury trial is protected whenever legal as opposed to equitable rights are to be enforced. Most recently this Court has suggested that the process of determining the "legal" nature of an action should include three considerations: (1) the custom with reference to such questions before the merger of law and equity in 1938; (2) the remedy sought; and (3) the practical abilities and limitations of juries. *Ross v. Bernard,* 396 U.S. 531, 583, n. 10.

B. (1) The action in the instant case was essentially a suit to recover money damages for the harm allegedly inflicted by the defendants in the course of committing a civil wrong against the plaintiff. At the time of trial the only issues of fact were whether the Loethers denied the rental of their apartment because of Mrs. Rogers' race and the extent of Mrs. Rogers' actual damages. There was no claim for any equitable relief at the time the availability of a jury trial was critical.

Several historical analogues at common law are available to this new statutory cause of action. The Seventh Circuit suggested suits against innkeepers for wrongfully refusing service when it was available, suits for defamation and the intentional infliction of emotional distress. *Rogers v. Loether,* 467 F. 2d at 1117-1118. In a similar action under the 1968 Act in district court in Nevada a number of other historical counterparts were identified. *Kastner v. Brackett,* 326 F. Supp. 1151, 1152 (D.C. Nev. 1971). The ready availability of these analogues confirms the "legal" nature of the instant case under the first test recommended in *Ross.*

(2) The test of the remedy sought was most compelling of the application of the Seventh Amendment right in *Ross* because the claim was for money damages. So also should it be compelling herein. The only relief sought on the day of trial, other than costs and attorneys' fees, was money damages — both compensatory and punitive. Even the plaintiff concedes that money damages constituted the pre-eminent remedy available at law. Petitioner's Brief, p. 39. Although juries have traditionally been called upon to decide the proper measure of compensatory damages the process of determining whether and the extent to which punitive damages should be

levied against the defendant depends even more on the collective judgment provided by a jury.

(3) Although this court did not explicitly apply the test of the "practical abilities and limitations of juries" in *Ross*, it can be regarded as including the considerations of whether a jury can be expected to deal competently with the factual issues which a particular case will present and whether the intervention of a jury trial will be disruptive of the Congressional scheme devised to administer its new statutory cause of action. The factual issues presented in actions under section 812 will require weighing the credibility of witnesses, discerning the true motivation of the defendant and measuring the damages of the plaintiff. All of these are tasks for which juries have always been regarded as competent and dependable.

The question of whether a jury trial would disrupt a statutory scheme was presented to this court in *Katchen v. Landy*, 382 U.S. 323 (1966). In that case the issue was the availability of a jury in a summary proceeding which was designed for quick and binding disposition of creditors' rights under the Bankruptcy Act. In the course of deciding that a court of bankruptcy had jurisdiction in the particular case to dispose of the claim without a jury, the court distinguished the plenary proceeding where a jury trial would be available. 382 U.S. 328. An analysis of the "civil action" authorized under section 812 of the 1968 Act reveals it is much more akin to the plenary proceeding than to the summary proceeding in *Katchen*. Hence the reasons given in *Katchen* for denying a jury, including the concern for the special statutory scheme, have no application in the instant case where Congress has authorized a "civil action."

ARGUMENT

I. THE CIVIL RIGHTS ACT OF 1968 DOES NOT SPECIFY HOW ISSUES OF FACT SHALL BE TRIED IN CIVIL ACTIONS BROUGHT IN DISTRICT COURT UNDER SECTION 812; THEREFORE, THE AVAILABILITY OF JURY TRIAL IS TO BE DECIDED BY REFERENCE TO THE SEVENTH AMENDMENT.

A. Use of the Term "The Court" Is Not Conclusive That Congress Intended the Trier of Fact to be a Judge Without a Jury.

The language of section 812 of the Civil Rights Act of 1968 does not compel the conclusion that Congress intended these civil actions to be tried by a judge alone. The statute merely identifies "the court" as the source of any final judgment awarding relief and it is arbitrary to assume that "the court" means "chancellor acting without a jury", particularly when the proceeding authorized by the statute in a "civil action."[1] A "civil action" is the ordinary type of lawsuit conducted in federal district courts under the Federal Rules of Civil Procedure where all claims — equitable and legal — may be joined.[1a] The term "civil action" is a well recognized term of art and has been taken from the Federal Rules of Civil Procedure for use in other statutes with the understanding by the draftsmen that the right of jury trial would exist.[2]

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[1] The term "the court" is frequently used in statutes in a sense that cannot be construed to mean the judge alone. Comment, The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom, 68 Nw. U. L. Rev. —, number 3, n. 144 (1973).

[1a] Fed. R. Civ. P. 2, 18.

[2] *Kennedy v. Lakso Company, Inc.*, 414 F. 2d 1249, 1252 (3d Cir. 1969).

The court of appeals carefully considered the argument, which had been adopted by the district court, that a fair construction of the statute excluded a trial by jury. But that construction was ultimately rejected in view of the provision in the private enforcement provision of the Fair Housing Act for both actual damages and punitive damages which would normally contemplate a finding by the jury as to the appropriate measure of these damages.[3] The court of appeals also recognized that it would be highly unusual for a federal statute to authorize the imposition of punitive damages to the extent of $1,000 without also according the right to trial by jury to the defendant against whom such a penalty might be enforced.[4]

Even if the Act can be fairly construed to mean that the factual issues in all private enforcement actions must be tried by a judge without a jury, the constitutionality of the statute under the Seventh Amendment must be resolved.[5] This the plaintiff concedes.[6]

B. There Are No Overriding Policy Considerations Identified by Congress in Connection With the Civil Rights Act of 1968 That Would Exclude Jury Trials.

The court of appeals found no legislative history which was useful on the question of the right to a jury trial in section 812 actions.[7] There were no committee reports reflecting any consensus on the issue and what little testimony there is available by the proponents of the Act at the hearings reflects an assumption that where only dam-

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[3] 467 F. 2d 1110, 1122-1123 (1972).

[4] Id. at 1123.

[5] *Minneapolis and St. Louis Railroad v. Bombolis*, 241 U.S. 211, 219.

[6] Petitioner's Brief, p. 7.

[7] 467 F. 2d 1110, 1123.

ages are sought, which was the exact status of this case at the time of trial, the case would be tried to a jury.[8]

Although there have been expressions of concern regarding the possible disinclination of juries to render verdicts in keeping with the law, nevertheless there are policy considerations consistent with the purpose of the 1968 Act which weigh in favor of submitting these issues to a jury. One such policy consideration would lie in the desirability of exposing to a wider section of the public, which a jury panel would represent, the meaning of the law against racial discrimination and its force and effect in the area of housing.

There is no evidence to which the plaintiff can point which demonstrates that a properly instructed panel of jurors, having been carefully examined as to their qualifications and biases by the attorneys and/or the judge pursuant to Rule 47, will refuse to return verdicts consistent with the facts and the law. All that is available is speculation that jurors, and perhaps only those in certain parts of the country, will be hostile to lawsuits brought on the basis of alleged racial discrimination. Unless there is some objective evidence that jurors are unworthy of having these questions entrusted to them, there is no justification for withholding such matters on the basis of the belief by some that impartial verdicts cannot be rendered. In this connection it may be recalled that before the recent series of Black Panther trials began, some interested sections of the public prophesied that those blacks could not get fair and dispassionate

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[8] Hearings on S. 3296 before the Subcommittee on Constitutional Rights of the Senate Committee on Judiciary, 89th Cong., 2nd Sess., pt. 2, 1178 (1966).

juries. However, this conventional wisdom did not survive the verdicts which were rendered.[9]

Although some lip service is paid to the techniques at trial which are available to purge a jury panel of prejudice and biases, the plaintiff does not even discuss the recent actions of Congress aimed at the earliest stages of jury selection. The Jury Selection and Service Act of 1968 by its prohibitions against racial, ethnic and economic discrimination now substantially insures that a cross-section of the public will file into the courtroom at the commencement of trial.[10] In 1972 Congress further amended 28 U.S.C. § 1863 to specify the process by which a random selection of members of the jury panel is guaranteed.[11] It would be very unusual for this Court to adopt an argument to the effect that these recent enactments by Congress were ineffective to accomplish their purpose and that federal jury panels still could not be trusted with sensitive matters. It is altogether more appropriate to conclude that since Congress has now acted out of its concern for insuring representative jury panels that this Court may properly disregard the Congressional expressions of concern for jury impartiality, cited by the plaintiff, which preceded the new, sweeping revisions of the federal law of jury selection and service.

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[9] See M. Kempton, *The Briar Patch, The People of the State of New York v. Lumumba Shakur, et al,* (1973); E. Kennebeck, *Juror Number Four,* (1973).

[10] Act of March 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 54, 28 U.S.C. 1862.

[11] Act. of Apr. 6, 1972, Pub. L. 92-269, § 2, 86 Stat. 117, 28 U.S.C. 1863.

II. THE SEVENTH AMENDMENT PRESERVES THE RIGHT TO JURY TRIAL TO PARTIES IN CIVIL ACTIONS FOR DAMAGES BROUGHT UNDER SECTION 812 OF THE CIVIL RIGHTS ACT OF 1968.

A. The Seventh Amendment Preserves the Right to Jury Trial to All Actions in the Nature of a Suit at Common Law.

The Seventh Amendment to the Constitution provides that in "Suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved." The amendment has been construed to preserve the right to a jury trial as it existed under English common law when the amendment was adopted in 1791.[12] The classical definition of the area within the purview of the Seventh Amendment was by Justice Story in *Parsons v. Bedford:*

> "By common law (the framers of the Constitution) meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law in equity, was often found in the same suit. . ." 28 U.S. (3 Pet.) 433, 447 (1830).

The constitutional test which has evolved depends upon an analysis of the proceeding in question and a search for the nearest historical analogue to be found in the pro-

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[12] *Shields v. Thomas,* 1 U.S. (18 How.) 209, 216 (1855); *In re Wood,* 210 U.S. 246, 258 (1908); *Dimick v. Schiedt,* 293 U.S. 474, 476 (1935); *Baltimore and Carolina Line, Inc. v. Redmen,* 295 U.S. 654, 657 (1935).

cedures which existed at common law. When a new cause of action is created by Congress and nothing is said about how the issues of fact are to be tried, as is the case with the 1968 Act, the jury trial issue is to be determined by fitting the cause to the nearest historical counterpart.[13]

An analysis of the instant case reflects that both equitable and legal types of relief were sought at the outset. The original prayer for relief asked for a temporary restraining order, a preliminary injunction and punitive damages. (6a). The request for actual damages became a part of the case after the first pre-trial conference. (18a). For reasons to be elaborated later in this Brief, the claims for money damages were unquestionably "legal" in nature. The principle that a party cannot be deprived of his constitutional right to a jury trial by a joinder of prayers for both legal and equitable relief has long been established. Both Justice Black and Justice Harlan referred in *Dairy Queen v. Wood,* 369 U.S. 469, to the 1891 decision of *Scott v. Neely* where this principle was recognized.[14]

After the adoption of the Federal Rules of Civil Procedure in 1938 federal courts were permitted, under Rule 18(b), to entertain an action in which both legal and equitable claims were advanced by the plaintiff. A practice developed after the merger, however, to use this jurisdiction over both types of claims to diminish the availability of jury trials. The practice was one whereby any

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[13] *Luria v. United States,* 231 U.S. 9, 27-28 (1913); *Ross v. Bernard,* 396 U.S. 531, 543 n. 1. This procedure is well recognized and accepted by the commentators. 5 Moore, para. 38.11(7); James § 8.6; Wright and Miller § 2316, at 79.

[14] 369 U.S. 471, 481.

issue common to both the legal and equitable claims was tried first to the court, thereby foreclosing the right to trial by jury on the common issues by way of collateral estoppel.[15]

That practice was at issue before the court in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). The holding in *Beacon Theatres* was that in a case uniting an equitable and a legal claim, the right to jury trial could not be lost by the sequence in which the claims were decided.[16] This is fundamentally an affirmation of the principle of *Scott*, reconfirmed in the setting of the new, merged procedure under the Federal Rules of Civil Procedure. The principle — that the right to jury trials should not be diminished by reason of a blending of legal claims with equitable claims — remained unchanged.[17]

In *Dairy Queen v. Wood*, this court was confronted with the argument that the right to jury trial could be

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[15] See *Dairy Queen v. Wood*, 369 U.S. 469, 472.

[16] 359 U.S. 500, 501-511.

[17] *Dairy Queen v. Wood*, 369 U.S. 469, n. 5. It appears that the merger of law and equity may have aggravated the process of ascertaining the extent of the Seventh Amendment right. Questions have been raised as to whether *Beacon Theatres* and *Dairy Queen*, while guarding against practices that tend to diminish the Seventh Amendment right, might also by their logic open the way for an improper diminution of equity's concurrent jurisdiction. (J. Moore, Federal Practice Rules Pamphlet, 810-811 (1971); *Ross v. Bernard: The Uncertain Future of the Seventh Amendment*, 81 Yale L.J. 112 (1971). There is no threat to reduce equity's jurisdiction when, as here, there is no claim for equitable relief at the time the availability or nonavailability of a jury trial becomes critical.

denied whenever the legal issues were "incidental" to the equitable issues. The plaintiff sued on an alleged breach of a contract for the use of the "Dairy Queen" trademark and requested (1) temporary and permanent injunctions; (2) an accounting of and judgment for money owing under the contract; and (3) an injunction pending the accounting to prevent the defendant from collecting money from "Dairy Queen" stores during the action. The court rejected the "incidental" argument out of hand and went on to emphasize that in *Beacon Theatres* it was held that where both legal and equitable issues were presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[18]

The legal claims in the instant action insure a jury trial under the principles of *Beacon Theatres* and *Dairy Queen* while the absence of equitable claims at the time of trial renders our case easier to decide. Unlike *Dairy Queen* there was no request for a permanent injunction herein and all of the equitable-injunctive relief had been granted on the basis of a non-binding decision on the merits well before trial. Unlike *Beacon Theatres* there was no potential for depriving the defendants of their right to a jury on the legal claim involving damages by having the common issues tried first by the judge because the plaintiff had voluntarily relinquished any claim for equitable relief well in advance of trial. For the same reason it is impossible to characterize the claim for damages as "incidental" to the equitable claims.

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[18] 369 U.S. 472-73.

B. A Civil Action for Damages on the Basis of Racial Discrimination Against the Plaintiff in the Rental of Housing is in the Nature of a Suit at Common Law.

1. The closest historical analogues to this action are actions at common law where jury trial was available.

The search for appropriate historical analogues is guided by Justice Story's definition of the reach of the Seventh Amendment to the effect that it:

> ". . . embraces all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they assume to settle legal rights."[19]

From this it is apparent that the Seventh Amendment protects jury trial for legal claims in whatever context they might be litigated. It does not aid analysis to argue, as does the plaintiff, that in the Civil Rights Act of 1968 we are faced with an entirely new cause of action, or that there was no mention of a right of action for racial discrimination in 1791. Under the historical test . . . "(t)he modern action and its ancient equivalent need not be identical."[20] The "literal" approach is particularly artificial in view of the analytical process exemplified by the Seventh Circuit when it found several historical common law counterparts to the statutory proceeding brought by the plaintiff in this case.[21]

In *Ross v. Bernard* three specific criteria were identified which may be used to resolve the Seventh Amend-

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[19] *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

[20] *Ochoa v. American Oil Co.*, 388 F. Supp. 914, 916 (S.D. Tex. 1972).

[21] 467 F. 2d 1110, 1117.

ment question with regard to a particular action. Consideration is to be given to:

(1) the pre-merger custom with reference to such questions;

(2) the remedy sought; and

(3) the practical abilities and limitations of juries.[22]

It was conceded that the first test, . . . "requiring extensive and possibly abstruse historical inquiry", was the most difficult to apply.[23] Nevertheless appropriate historical analogues to the plaintiff's claim in this lawsuit are readily apparent.

This case is in the nature of a tort action — damages are sought to compensate the plaintiff for the harm done by alleged "civil wrong." The Seventh Circuit recognized that the particular "civil wrong" alleged in this action was analogous to common law actions for defamation and infliction of emotional harm.[24] The right to be free from harm caused by infliction of mental or emotional indignity was conceived at common law and has been steadily expanded.[25] Professors Gregory and Kalven have suggested that this growth in the common law has developed to the point of providing relief for harm occasioned by racial discrimination.[26]

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[22] *Ross v. Bernard*, 396 U.S. 531, 538 n. 10.

[23] Id.

[24] 467 F. 2d 1110, 1117.

[25] C. Magruder, *Mental and Emotional Distress in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936).

[26] Gregory and Kalven, *Cases and Materials on Torts*, 961 (2d ed. 1969).

In a case virtually identical to ours in that the plaintiff sought damages under the Civil Rights Act of 1968, a district court judge discerned that:

> "The instant action is one traditionally legal in character. From one point of view, it is an action on an oral contract for damages for its breach, a common law action on the case for assumpsit alleging the breach of the landlord-tenant relationship by an eviction dictated by racial discrimination. From another aspect, emphasizing the allegedly false reasons given to justify the eviction, it is like a common law action on the case for deceit." *Kastner v. Brackett*, 326 F. Supp. 1151, 1152 (Nev. 1971).

In *Kastner* the plaintiffs who were seeking to have the jury trial demand stricken cited Judge Reynolds' decision in *Rogers* as authority. District Judge Thompson recognized that *Rogers* was squarely in point but rejected it because, ". . . the *Rogers* decision does not comport with my understanding of the constitutional right to a jury trial."[27] The motion to strike the jury demand was denied.[28]

The number of historical analogues identified by the Seventh Circuit and the district court for Nevada suggests that the first test proposed in *Ross* is not as difficult to apply, at least in these actions, as was predicted. In any case, it appears that the "legal nature" of the case is readily discernable from a historical point of view.[29]

2. The remedy sought herein particularly qualifies this action as one in the nature of a suit at common law.

The second of the three criteria identified by this court in *Ross v. Bernard* — the remedy sought — was applied

[27] 326 F. Supp. 1152.
[28] Id.
[29] Id.

in *Ross* and the conclusion was that the particular claim was a legal one, without doubt, because the relief sought was money damages.[30] Authority for this conclusion is readily available in the decision in *Dairy Queen* where this Court explicitly agreed with the contention that insofar as the complaint requested a money judgment it presented a claim which was "unquestionably legal."[31]

Section 812 of the Civil Rights Act of 1968 authorizes judgments in favor of a successful plaintiff for "actual damages and not more than $1,000 punitive damages."[32] The specificity of the language used by Congress definitely excludes any characterization of the "damage" award as restitutive or otherwise partaking of some equitable nature.[33] The term "actual damages" is synonymous in the law with compensatory damages and its use by Congress authorizes the recovery of the unliquidated monetary equivalent of the harm and expense sustained by the plaintiff.[34]

In our own case the plaintiff initiated her action with a request for punitive damages and subsequently enlarged

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[30] 396 U.S. 542.

[31] 369 U.S. 476.

[32] Section 812(c), Civil Rights Act of 1968, 42 U.S.C., Sec. 3612(c).

[33] In this connection it is of more than passing interest to note that since the enactment of the 1968 Act, Congress has acted to amend the private enforcement provision of the Civil Rights Act of 1964 as it relates to the relief available. (Pub. L. 92-261, § 4, Mar. 24, 1972, 86 Stats. 104). The district court is authorized to order an award of back pay, as had been the case under the initial version of the law, and the Act was amended to authorize "any other *equitable relief* as the court deems appropriate." 42 U.S.C. 2000e-5, as amended. By the addition of this language Congress has acted to confirm that back pay awards in Title VII actions are "equitable" in nature. It was on this basis that the Seventh Circuit in *Rogers* distinguished the numerous lower court decisions which held that jury trial was not available in actions for back pay in Title VII actions. (467 F. 2d 1110, 1121-22).

[34] *Weider v. Hoffman*, 238 F. Supp. 437, 445 (M.D.Penn. 1965).

her request for relief to include her "actual damages."[35] At the time this claim was made the judge characterized the issues to be tried as being ". . . the issue of discrimination and the issue of actual damages suffered by the plaintiff."[36] The Standing Final Pre-Trial Order filed May 7, 1970 required the plaintiff to submit an itemized statement of her special damages and the Notice of Trial scheduled a "Court Trial on Damage Issue" for October 26, 1970.[37] When the trial opened on that day the plaintiff had relinquished all claims for relief other than punitive and actual damages.[38] In applying the criterion of the remedy sought to this case, the Seventh Circuit recognized that the request for damages unquestionably pointed to the matter being tried to a jury.[39]

The claim for punitive damages provides additional justification for trial by jury. Historically only a court at law could award punitive damages because of the principle of equity that it should attempt to do justice between the parties without imposing a penalty.[40] There may be no decision in the law that depends more upon the common sense judgment of a jury than the decision of whether punitive damages should be levied and to what extent. Immediately after announcing his decision to levy $250

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[35] 18(a).

[36] Id.

[37] 36(a).

[38] 37(a)-41(a); Trial of October 26-27, 1970, p. 206.

[39] 467 F. 2d 1116.

[40] *Livingston v. Woodworth*, 56 U.S. (15 How.) 624, 630-631 (1853); *Decorative Stone Company v. Building Trades Council*, 23 F. 2d 426 (2nd Cir. 1928); *Fleitmann v. Welsbach Street Lighting Company*, 240 U.S. 27 (1916); *Stevens v. Gladding*, 58 U.S. (17 How.) 604, 608-609 (1854).

in punitive damages against the Loethers, Judge Reynolds commented, "It probably takes the wisdom of Solomon to decide these cases fairly." In practice, however, the award of punitive damages is normally entrusted to the collective wisdom of a jury on the basis of its proven expertise.

It is clear that if the plaintiff had appeared before a pre-merger court of equity and sought as her relief only punitive damages and actual damages the equity court would have refused to hear the matter since the jurisdiction of equity was primarily dependent on the absence of an adequate remedy at law.[41] Where damages were adequate to remedy the injury, the equity courts would refuse jurisdiction and the plaintiff would be referred to the courts at law where the facts would be found by a jury.[42]

Certainly there is no authority for the plaintiff's theory that the trial court has the discretion to withhold an award of damages if the proof of the damages is adequate and the statutory right to recover them is established. It is evident from the history of this case that the plaintiff proceeded in quest of a monetary recovery in the face of the trial court's observation that the purpose of the statute had been fulfilled and that the defendants had absolved themselves of any need for punishment by their offer to rent the apartment to any Negro family.[43] An

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[41] *Scott v. Neely*, 140 U.S. 106, 110 (1891). Indeed, as this court observed in *Ross v. Bernard*, 369 U.S. 531, 539, between 1789 and 1938 courts of equity were expressly forbidden from hearing any suit in which there was adequate remedy at law. Act of September 24, 1789, c 20 §16.1 Stat. 82, Judicial Code of 1911, §267.36 Stat. 1163.

[42] Id.

[43] Proceedings of April 30, 1970, pp. 4-5.

award of actual damages was finally denied by the trial court, not as a matter of discretion by way of shaping a complete remedy, but because of a failure of proof.[44]

3. The factual issues are well within the "practical abilities and limitations of juries" and the statutory proceedings can readily accommodate both a jury trial, and the need for prompt relief.

The third criterion identified in *Ross v. Bernard* for discerning the "legal" nature of the matter to be tried was the "practical abilities and limitations of juries." This test was not discussed beyond being identified in *Ross* and its full meaning is not clear in the absence of some explicit application. However, we comprehend its meaning to include at least a consideration of whether: (a) in view of the particular factual issues to be tried, a jury can be expected to deal with them competently and justly; and (b) whether the presence of a jury trial is an obstacle under the particular circumstances to efficient administration of justice.

In connection with the first inquiry — whether juries may be expected to deal competently and justly with the issues — the factual issues which are likely to be presented in private enforcement actions brought under Title VIII should be considered. They will essentially present the need to weigh the credibility of the parties and witnesses to discern their motivations as well as to decide whether disputed events actually occurred or disputed comments were really made. The question of the motivation of the defendant will be particularly critical here as to the extent to which, if at all, racial considerations

[44] Trial of October 26-27, 1970, p. 210.

played a part in the defendant's refusal to rent or sell to a person in a given case.

In our own situation the critical fact-finding to be performed was in deciding whether LeRoy Loether objected to the plaintiff because of her race or to the person who was helping the plaintiff find an apartment because of her "obnoxious behavior."[45] LeRoy Loether's answer to the allegation of racial discrimination was that Mrs. Rogers' race was unknown to him when he made up his mind and that he had acted out of resentment of Miss Haessly's telling his wife that he "had to rent" to someone. He persisted in this attitude to the point of testifying at the trial on cross-examination that he wouldn't even rent the apartment to Judge Reynolds under similar circumstances.[46] The fact-finding involved deciding whether Loether was simply a "stubborn German" as his wife characterized him or was merely putting on such a pose to conceal a racial motivation.[47] The testimony presents a question of fact that obviously would have been left for the jury to decide in any other context since, as the court of appeals noted, the evidence was "marginal."[48]

These factual issues are no different and are no more difficult to decide than those presented in defamation actions or actions for damages to a person or property in which both compensatory and punitive damages may be sought. The Seventh Amendment entitles the parties to a jury trial in those actions.[49] The only other factual issues

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[45] 467 F. 2d 1110, 1112.

[46] Trial of October 26-27, 1970, p. 105.

[47] Proceedings of November 20, 1969, p. 71.

[48] 467 F. 2d 1110, 1111.

[49] 396 U.S. 531, 533.

in actions under section 812 relate to the measure of damages and it is virtually conceded that this fact-finding function is in the special province of the juries. Thus it may be safely concluded that the issues herein are not of such a complicated nature that they can be satisfactorily unraveled only by a judge sitting as a court of equity. Indeed the factual disputes are of a nature whereby the use of juries is particularly to be commended.

The remainder of this Brief will be devoted to showing that the private enforcement proceeding under section 812, especially as exemplified in this case, is not one in which a jury trial frustrates a need for prompt relief and that a jury would not be a disruptive intrusion into the statutory scheme. Mrs. Rogers began her action with a request for immediate relief in the form of a temporary restraining order, followed by a preliminary injunction. Judge Reynolds speedily granted both requests without being hindered in any way by a jury. The preliminary injunction forbade the rental of the apartment in question until a final determination of the case was had on the merits.[50] This had the intended effect of preserving the *status quo* and so it remained until the plaintiff consented to the dissolution of the injunction. All of the "prompt" relief available under section 812(c) had been requested and granted well before the issue of the jury trial was decided. If, as the plaintiff suggests at page 49 of her Brief, the purpose of the 1968 Act is largely fulfilled by speedy action to prevent a home or apartment from being sold or leased to another person, the instant case demonstrates that the purpose can readily be accomplished without any hindrance by a jury trial.

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[50] 16a.

Also it is apparent that Congress recognized the need for prompt relief and early resolution of these cases even within the format of a civil action. The district judge is specifically authorized to move the case ahead on his calendar by section 814 of the Act and Judge Reynolds did expedite the matter by scheduling a pre-trial conference only two weeks after entry of the preliminary injunction.[51] During the exchange of views between the attorneys and the judge on the issue of jury trial, it was never suggested by anyone that a jury would delay the case and the opinion denying the defendants' request for a jury does not even mention this possibility.[52]

The plaintiff suggests that the damages awarded should be considered only as the "clean-up" performed by equity as a part of a statutory scheme constitutionally permissible under *Katchen v. Landy*, 382 U.S. 323 (1966). A strenuous effort is made to escape the "non-constitutional" decisions in *Beacon* and *Dairy Queen*, and to fit this private enforcement action into a procedural mold outside the reach of the Seventh Amendment. This argument is altogether inappropriate to the facts of this particular

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[51] 17a.

[52] Proceedings of April 30, 1970; 23a-28a. In connection with plaintiff's present belief that the right to a jury trial will inevitably delay disposition in contrast to the speedy procedure available with trials to the judge alone, it is interesting to note that the Citizens Study Committee on Judicial Organization in Wisconsin has concluded that delay in getting matters on for trial by juries is not inevitable. A comprehensive review of the entire state judicial system in Wisconsin was accomplished over an 18-month period and its report was submitted in January, 1973. One of its conclusions was that the administrative procedures of civil juries were sufficiently susceptible to improvement to make jury trials as readily available as trials to the court and the Committee recommended steps be taken towards this end. (CITIZENS STUDY COMMITTEE ON JUDICIAL ORGANIZATION Report to Governor Patrick J. Lucey. January, 1973, Chap. V, p. 207).

case and civil actions under section 812 do not fit the pattern exemplified in *Katchen*.

It is readily apparent from the record that at the time of trial the plaintiff had an adequate remedy at law and had long since exhausted the claims for relief properly addressed to the equity powers of the district judge. There was no role to be played by equity at the time the availability of a jury became important.

When we turn to consider the application of *Katchen v. Landy*, it is particularly important to recognize which of the proceedings under the Bankruptcy Act was in question in that case. At issue was the jurisdiction of the bankruptcy referee in a *summary* proceeding to order the surrender of voidable preferences. The plaintiff had filed a claim in the bankruptcy proceeding and the trustee counterclaimed on the basis of alleged voidable preferences. If the plaintiff had not filed his claim in bankruptcy, the trustee would have had to sue in a *plenary* action, where a jury trial would have been available, to recover the preferences.

The plaintiff argued that *Beacon* and *Dairy Queen* forbade the referee from acting on the preference without a jury. However the referee's jurisdiction to act on the preferences in the summary proceeding was upheld and *Beacon* and *Dairy Queen* were distinguished on the basis that neither case, ". . . involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury." 382 U.S. 323, 339.

The jurisdiction of bankruptcy courts in summary proceedings must be distinguished from and contrasted to

the jurisdiction of federal courts in plenary actions under the Bankruptcy Act and this distinction was made in *Katchen*.[53] The term "summary jurisdiction" refers to a jurisdictional grant in the Bankruptcy Act.[54] Within this jurisdiction the bankruptcy court, almost invariably a Referee in Bankruptcy, conducts "summary proceedings" which are based on the use of petitions and orders to show cause rather than formal pleadings. The summary proceeding will usually be instituted and disposed of in a quicker and less formal manner than an ordinary lawsuit.[55]

The term "plenary jurisdiction" refers to actions instituted in district court and involves all the normal attributes of court trial, including formal pleadings, cross-examination of witnesses and the right to jury trial.[56] Collier has characterized the plenary suit as, ". . . the regular, ordinary *civil action*, with summons (or subpoena), formal pleadings, full trial, judgment and the other attendant formalities."[57] (emphasis supplied)

Since the plaintiff has argued that *Katchen* is dispositive of our case, the relevant inquiry is whether a private enforcement action under section 812 more nearly corresponds to the plenary or to the summary proceedings under the Bankruptcy Act. When Congress chose to de-

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[53] 382 U.S. 329.

[54] Section 2 of the Bankruptcy Act, 11 U.S.C. § 11.

[55] 2 *Collier on Bankruptcy*, para. 23.02(2) (14th ed. 1971).

[56] *Tamasha Town and Country Club v. McAlester Construction Finance Corporation*, 252 F. Supp. 80, 85 (S.D.Cal. C.D. 1966).

[57] 2 *Collier on Bankruptcy*, para. 23.02(2) (14th ed. 1971); Professor Moore concurs that the plenary action in a court of bankruptcy proceeds in a federal court. . . "as any other civil action." 5 Moore's § 38.03(4), n. 17.

note the section 812 action as a "civil action" it gave clear indication that it intended an ordinary lawsuit much more nearly akin to the plenary than to the summary proceeding. Under the Federal Rules of Civil Procedure every "civil action", including a section 812 action, is commenced by filing a complaint with the court.[58] This event, together with the sequence of events it triggers by operation of Rules 4 and 12 of the Federal Rules, distinguishes the section 812 action from the summary proceeding which this court acted to preserve in *Katchen*.[59] The entire formal progression in our case from the pleadings through the various motions, pre-trial conferences, pre-trial orders, trial and judgment marks the action as a typical "civil action" as opposed to a special, statutory proceeding which is streamlined for speed of disposition.

The inevitable conclusion is that *Katchen* is not dispositive of the instant case. In *Katchen* this court acted to protect a proceeding entirely distinguishable from the "civil action" authorized by section 812. A private enforcement proceeding for money damages under the Civil Rights Act of 1968 has much more in common as a lawsuit with the plenary proceeding under the Bankruptcy Act than with the summary proceeding in *Katchen*. The court need not be concerned in the instant case that the intervention of a jury trial will dismember a special statutory scheme since there is nothing more natural than a jury in a civil action.

It should not be forgotten that the 1968 Act provides for an alternative to proceeding with a civil action in district court and that the alternative has more in common with the "summary proceeding" than with the instant

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[58] Fed. R. Civ. P. 3.

[59] 382 U.S. 323, 339.

case. Sections 810 and 811, whose provisions portend more expedient relief than an ordinary lawsuit, provide for informal proceedings before the Secretary of Housing and Urban Development. Within thirty days of a complaint the Secretary shall investigate the matter brought to his attention by an aggrieved party and notify whether steps are going to be taken to resolve the dispute. Section 811 equips the Secretary with a wide range of discovery tools, including authority to issue subpoenas, to assist in his investigation. If the Secretary's efforts at obtaining voluntary compliance with the law within thirty days are not successful, the aggrieved party may commence his civil action in United State district court.

This action was started without the benefit of the efforts of the Secretary to achieve a conciliation and at the end Judge Reynolds was moved to comment that, ". . . this whole case is a tragedy."[80] At least a part of this "tragedy" lies in the initial decision, before the civil action was commenced, to forsake the informal procedures for conciliating the dispute.

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed.

Respectfully submitted,

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[80] Trial of October 26-27, 1970, p. 200.